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No. 88-

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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LDB CORPORATION,

*Petitioner,*

v.

GIBRALTAR SAVINGS,

*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTION PRESENTED

Whether the Court of Appeals violated the Seventh Amendment right to trial by jury when it (a) affirmed a judgment of fraud liability based on alleged misrepresentations which were not embodied in the jury interrogatory on which affirmance was based, and which the district court refused to submit to the jury, and (b) directed the entry of a damage award on a different theory and in a different amount than the verdict actually returned by the jury.

## PARTIES TO THE PROCEEDING

In addition to the named parties, Lloyd D. Brinkman was cross-appellee in the court of appeals, and is also an affiliate of the petitioner.

After the filing of the briefs below, petitioner changed its name from LDBrinkman Corporation to LDB Corporation, and the latter name is used in this petition. The petitioner has six wholly owned subsidiaries.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

LDB Corporation hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on December 2, 1988, which affirmed in part and reversed in part a decision of the United States District Court for the Western District of Texas and remanded the case to the district court for further proceedings.

## OPINIONS BELOW

The amended opinion of the court of appeals, App. 1a-65a, is reported at 860 F.2d 1275. The amended opinion of the district court, App. 70a-74a, is not reported.

## JURISDICTION

The judgment of the court of appeals was entered on December 2, 1988. App. 66a-67a. The order of the court of appeals denying rehearing was entered on December 30, 1988. App. 68a-69a. On March 17, 1989, Mr. Justice White entered an order extending the time for filing a petition to and including April 14, 1989.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment to the Constitution provides that:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

## STATEMENT

This petition seeks review of a portion of a decision by the United States Court of Appeals for the Fifth Circuit affirming the district court judgment of liability against petitioner, then known as LDBrinkman Corporation, on the theory of fraud, and remanding the case to the district judge for recalculation of damages.[1] The judgment against petitioner grows out of a transaction in which BDI, an indirect subsidiary of petitioner, borrowed $5 million from the respondent Gibraltar Savings. BI, another of petitioner's subsidiaries (and the owner of BDI), and two individuals (Woody and McDougal) were

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[1] Petitioner is unsure whether the court of appeals' recalculation of damages applies to the fraud theory only, or also to the theory of tortious interference with contract on which the jury found liability but awarded no damages. *See, infra*, p. 7. To the extent that the judgment has the latter effect, this petition seeks review of that action.

guarantors on the note.[2] Other parties have been involved in earlier stages of this litigation, and various theories of liability have been advanced.[3] For purposes of this

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[2] At the time the loan was made, Lloyd D. Brinkman was the controlling beneficial owner of petitioner, then known as LDBrinkman Corp. LDBrinkman Corp., in turn, was the sole owner of BI, which owned all of the stock of the borrower, BDI. Ben D. Woody and Delbert G. McDougal were both guarantors on the loan and Woody was a director of BDI. The corporate structure, as far as relevant here, can thus be presented as follows:

Lloyd D. Brinkman
|
LDB Corp., formerly known as LDBrinkman Corporation
(Petitioner)
|
Brinkcraft, Inc. (BI)
(guarantor)
|
Brinkcraft Development, Inc. (BDI)
(borrower)
(Woody and McDougal, guarantors)

*See* App. 5a.

[3] In addition to petitioner, Gibraltar sued Lloyd D. Brinkman, BI, BDI, Woody and McDougal in federal district court. BI and BDI declared bankruptcy and Gibraltar obtained an agreed judgment in bankruptcy against their corporate successors in the amount of $5,000,000 plus $5,000 attorneys' fees. Gibraltar settled for $350,000 each with Woody and McDougal, and Gibraltar received an assignment from them of their interests in certain real estate development partnerships, in which BI, Woody and McDougal were partners. Following trial, judgment was entered in favor of defendant Lloyd D. Brinkman on all theories of liability. App. 70a-74a.

In addition to the fraud and tortious interference theories discussed here, respondent sought damages against petitioner and Lloyd D. Brinkman on an alter ego theory and for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 *et seq.* The jury found no RICO violations. App. 79a. The jury's finding of liability as to petitioner (but not Lloyd D. Brinkman) on the alter ego theory was set aside by the district court, which action was affirmed on appeal. App. 18a. Petitioner counterclaimed for usury, which claim was rejected by both the trial and appellate courts. App. 42a-45a. The district court also entered

petition, consideration need be given only to the allegations of fraud and tortious interference with contract in connection with the failure of BDI to repay the $5 million note.

The negotiation and execution of the loan from Gibraltar to BDI took place in August and September, 1984. The loan discussions were conducted between Frederick Farlow, a Gibraltar Savings loan production officer, and Thomas Ratcliffe, a director of BI and petitioner's chief financial officer. App. 9a. Extensive evidence was presented at the trial relating to the respondent's allegations that the petitioner fraudulently induced respondent to make the loan through misrepresentations made during the loan negotiations. App. 8a-12a. Evidence was also introduced concerning allegations by Gibraltar that the petitioner tortiously interfered with BDI's performance of its obligations under the note. App. 47a.

The case was submitted to the jury on interrogatories concerning five alleged misrepresentations made by Ratcliffe to Farlow during the loan discussions. App. 75a-79a. The jury found liability on the first two fraud interrogatories, but not the third, fourth or fifth. App. 75a-76a. The respondent proposed, but the district court declined to submit to the jury a sixth interrogatory concerning an alleged promise that petitioner would not sell or dispose of BI until the loan was repaid. App. 80a. On the fraud claim, the jury was instructed on an out-of-pocket theory of damages and the jury assessed damages in the amount of $6 million. App. 76a. The jury also found that the petitioner wrongfully interfered with BDI's performance of its contractual obligations under the note, but, under a distinct, benefit-of-the-bargain damages instruction, found that there were no damages on the wrongful interference claim. App. 77a. The district court entered judgment in favor of respondent and

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an attorneys' fee award against the petitioner, which was reversed by the court of appeals. App. 40a-42a.

against the petitioner in the amount of $6 million. App. 70a-74a.

The petitioner took an appeal from the district court judgment to the United States Court of Appeals for the Fifth Circuit. That court set aside the finding of fraud under the first interrogatory, App. 50a-52a, leaving only the second interrogatory as the basis for the $6 million fraud damages award. In that interrogatory the jury found that Gibraltar was defrauded by a representation that the business of BI and BDI was "ongoing and successful in scope." App. 75a. In upholding the fraud judgment based on this second interrogatory, the court of appeals discussed at length and relied explicitly on statements in addition to the "ongoing and successful" representation that the jury found.

Specifically, the court of appeals rejected petitioner's contention that the "ongoing and successful" statement was an ambiguous statement of opinion and therefore was legally insufficient to support a fraud claim. In doing so, the court reviewed the evidence, offered at trial, of promises allegedly made by petitioner not to sell or dispose of BI and BDI, and to support them financially until the loan was repaid. App. 53a-60a. The court treated the jury's verdict as embodying statements beyond the finding of the jury in the interrogatory that the business of BI and BDI was "ongoing and successful":

> The debate thus is over the characterization of Ratcliffe's representations that the Brinkcraft subsidiaries were "ongoing and successful" *and that LDBrinkman Corp. would continue to finance them so long as Gibraltar's loan was outstanding.*

App. 53a (emphasis added). The court also relied upon "LDBrinkman Corp.'s promise to keep the subsidiary viable until the loan was repaid," App. 56a, as the basis for concluding that the requirement that the " 'false promises' be reckless or with knowledge of their falsity"

was satisfied. App. 56a. In finding knowing and reckless falsehood, the court thus looked to the evidence presented that petitioner had made a decision to sell or dispose of BI before the loan was made.[4] App. 56a. The jury made no finding as to either the alleged underlying promise or any prior decision to sell BI.

With regard to the jury's award of damages, the court of appeals first rejected the out-of-pocket theory on which the jury had been instructed with reference to the fraud claim. App. 62a. The court nonetheless proceeded to analyze and modify the $6 million verdict returned by the jury under that instruction. It found it "quite apparent" that the jury had included in the verdict a component of prejudgment interest in addition to the $5 million loan. App. 63a. While finding the inclusion of interest permissible in principle, the court of appeals directed that the jury's "error" in "apparently select[ing]" an interest rate somewhat higher than that provided in the note "must be reformed."[5] App. 63a-64a. It also concluded that "[a]djustment in accordance with actual dam-

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[4] In a footnote, among many other references to the alleged promise to retain and support the subsidiaries, the court also stated:

> Ratcliffe's representations that BI and BDI were ongoing and successful in scope likewise were false representations, both of existing fact and as to LDBrinkman Corp.'s and Brinkman's secret intention not to perform. As evidenced by internal memoranda, LDBrinkman Corp. had determined, as early as March 1984, that BI was unprofitable and began its efforts to get rid of the subsidiary while negotiating with Gibraltar.

App. 55a n.47. The final sentence in this quotation from the opinion of the court below relates precisely to the subject of the interrogatory which was rejected by the district court and never submitted to the jury. *See* App. 80a.

[5] The court noted that "[t]he jury knew that the interest accrued and unpaid at the time of trial was $787,226." App. 63a.

ages also appears to be appropriate," and directed the district court, on remand "for this limited purpose only," to "reduce the judgment by the amounts, if any, which Gibraltar has been paid by Woody, McDougal, and/or BDI, BI, and their successors." [6] App. 64a.

In discussing the jury's verdict of liability for tortious interference with contract, the court concluded that "this jury finding was supported by the evidence, and that judgment—in an amount as will be discussed—on this verdict is appropriate." App. 47a. The court also stated that "[t]he finding that Gibraltar sustained no damage is inconsistent with the finding of interference," but reconciled the inconsistency by inferring that the jury evidently intended to avoid a double recovery. App. 48a. The court did not elsewhere explicitly discuss the issue of damages in the context of the tortious interference claim. In revising the jury's $6 million verdict as to the fraud damage award, App. 61a-64a, the court did not state whether its analysis also constituted a revision of the jury's zero damages verdict as to the tortious interference claim.[7]

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[6] The court of appeals noted in conclusion that:

> In summary, the district court correctly entered judgment in favor of Gibraltar and against LDBrinkman Corporation for $5,000,000, representing the principle amount due on the Gibraltar note from BDI.

App. 64a. In fact, however, the district court had entered judgment in the amount of $6 million. App. 72a.

[7] The court of appeals stated that "the jury awarded Gibraltar Savings $6 million against the defendants as the borrower's (and its parent-guarantor's) 'alter ego,' *and for both fraud and tortious interference with the borrower's contractual relationships. . . .*" App. 3a (emphasis added). In fact, the jury had awarded no damages on the tortious interference claim. App. 77a.

The court of appeals also stated that the district court had entered judgment on the fraud charge "and upon a finding of tortious interference with contractual relations." App. 3a. In fact, the Amended Final Judgment of the district court made no refer-

## REASONS FOR GRANTING THE WRIT

### I. COURTS MAY DETERMINE FACTUAL ISSUES TO WHICH THE RIGHT OF TRIAL BY JURY IS APPLICABLE ONLY WHERE THE JURY COULD NOT REASONABLY REACH ANY OTHER CONCLUSION

The Seventh Amendment's guarantee of trial by jury is faithfully reflected in Rule 38 of the Federal Rules of Civil Procedure which expressly provides that the right "shall be preserved to the parties inviolate." This Court has construed these provisions as requiring a jury trial on factual issues for which a jury trial would have been available in 1791. *Galloway* v. *United States*, 319 U.S. 372, 390-392 (1943). In interpreting the Seventh Amendment following the merger of law and equity under the Federal Rules of Civil Procedure, *see* Rule 1, and in the face of evolving procedures, the Court's decisions make clear that "[t]he federal policy favoring jury trials is of historic and continuing strength." *Simler* v. *Conner*, 372 U.S. 221, 222 (1963).

The right to a jury trial does allow the use of a number of procedural devices which, while leaving fact issues to the jury, allow the courts to intervene on questions of law, such as the existence of adequate evidence to support the verdict of the jury. In particular, summary judgment,[8] directed verdict,[9] and judgment notwithstanding the verdict,[10] are procedures that are accepted as con-

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ence whatever to either the plaintiff's claim of tortious interference with contract or the jury's findings on that claim. App. 70a-74a.

[8] *E.g.*, *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986). *See* Fed. R. Civ. P. 56.

[9] *Galloway* v. *United States*, 319 U.S. at 396. *See* Fed. R. Civ. P. 50(a).

[10] *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U.S. 654, 659-660 (1935). *See* Fed. R. Civ. P. 50(b).

sistent with the Seventh Amendment though they have the effect of taking the final decision on a particular issue away from the jury. In upholding these procedures and articulating the reasons for doing so, the Court has clearly limited the role that district courts may play in factual determinations where a right to a jury trial under the Seventh Amendment is applicable.

With regard to such issues, the trial court's role is limited to rulings of law with regard to the sufficiency of the evidence. The judge may only determine the legal question whether there is a colorable issue of fact to be resolved. In the context of summary judgment, an issue may be removed from the jury only where "there is no genuine issue as to any material fact," so that "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. Such a genuine issue is lacking when no "fair-minded jury could return a verdict for the [non-moving party] on the evidence presented." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Similarly, with regard to motions for directed verdict and judgment notwithstanding the verdict, the test is whether "the evidence is such that without weighing the credibiiity of the witnesses there can be but one reasonable conclusion as to the verdict." [11] *Brady* v. *Southern Ry. Co.*, 320 U.S. 476, 479-480 (1943); *Berry* v. *United States*, 312 U.S. 450, 453, 456 (1941).

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[11] The limitations on the district court's role in finding facts are further defined by this Court's decisions concerning the procedures of remittitur and additur. The Court has upheld the former procedure, which involves a conditional order of a new trial, to be vacated if the plaintiff agrees to remit a specified amount of the jury award. *Gila Valley, G. & N. Ry. Co.* v. *Hall*, 232 U.S. 94, 103-105 (1914); *Northern Pacific R.R. Co.* v. *Herbert*, 116 U.S. 642, 646-647 (1886). At the same time, it has struck down the procedure of additur as inconsistent with the Seventh Amendment right to a jury trial, relying on distinctions both of historical practice at common law, and on the greater intrusion on jury prerogatives occasioned by adding to, as compared with subtracting from, the jury's award. *Dimick* v. *Schiedt*, 293 U.S. 474, 482, 486 (1935).

The present case involves action not by the trial judge, but by the court of appeals on review of a jury's verdict. The Seventh Amendment's prohibition on reexamination of jury verdicts by a "Court of the United States" of course applies to action by the courts of appeals. *Atlantic & Gulf Stevedores* v. *Ellerman Lines*, 369 U.S. 355, 358-359 (1962). In general, by virtue of their lack of direct familiarity with the evidence in issue, appellate courts must exercise even greater restraint than trial judges in resolving on legal grounds asserted issues of fact.[12] The Seventh Amendment limitation on appellate review of jury verdicts is long recognized, *Parsons* v. *Bedford*, 3 Peters 433 (1830), though only infrequently discussed by this Court. *E.g.*, *Dick* v. *New York Life Insurance Co.*, 359 U.S. 437 (1959) (reversing on Seventh Amendment grounds decision of appellate court that plaintiff's evidence was insufficient to support the verdict); *Rogers* v. *Missouri Pacific R.R. Co.*, 352 U.S. 500 (1957) (same). Where a jury has entered a verdict making particular findings on issues as to which the jury right is applicable, the court of appeals is certainly no more entitled than the district court on a motion for directed verdict or judgment notwithstanding the verdict to reexamine or add to those findings.[13]

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[12] One manifestation of this more limited role of the appellate courts is the requirement that a party seek not only a directed verdict but also a judgment notwithstanding the verdict in order to preserve for appellate review the issue of the denial of the directed verdict. *Globe Liquor Co.* v. *San Roman*, 332 U.S. 571, 572-574 (1948); *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217 (1947).

[13] As this Court stated in *Atlantic & Gulf Stevedores* v. *Ellerman Lines*, 369 U.S. 355, 358-359 (1962):

> We might agree with the Court of Appeals had the questions of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amend-

The next section shows by references to the record and the proceedings below, that the court of appeals in fact reached its decision by a process which usurps the role of the jury in civil cases under the Seventh Amendment.

## II. THE JUDGMENT OF THE COURT OF APPEALS RESTS ON FACT-FINDINGS ON ISSUES THAT WERE NEVER SUBMITTED TO THE JURY, AS TO WHICH REASONABLE JURORS MIGHT DISAGREE

The court of appeals in this case has lost touch with the proper role of judges in reviewing jury verdicts, and has, in at least two respects, violated the Seventh Amendment right to trial by jury.

### A. Summary

*First*, in affirming a judgment of liability against petitioner on a theory of fraud, the court of appeals found and relied upon facts additional to those found by the jury in response to the interrogatories submitted to it. App. 48a-60a.

*Second*, though it declined to sustain the jury's finding of damages in the amount of $6 million with regard to the fraud claim, the court of appeals did not remand the case for a new trial on that issue, but rather directed the district judge to recalculate the amount under a different theory than the one on which the damage issue was submitted to the jury.[14]

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ment says that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

[14] To the extent that the court of appeals did in fact substitute its own multi-million dollar award for the jury's award of no damages with regard to the tortious interference claim, *see* p. 7, *supra*, we seek the Court's review of that aspect of the judgment as well.

At no point in its opinion did the court of appeals acknowledge the principle that the role of judges in directing verdicts on factual issues is limited to situations where no reasonable fact-finder could conclude otherwise. Rather, the court simply reviewed the factual record and relied on its own over-all *de novo* assessment to supplement or replace the jury's verdict. These factual findings by the court of appeals, entered to support a judgment for the plaintiff on whom the burden of proof rests, cannot possibly be justified as the only conclusions that the jury could reasonably have reached.

**B. Fraud Liability**

The court of appeals affirmed the finding of liability under the fraud theory, based on the answer to a single jury interrogatory finding that "LDBrinkman Corporation committed fraud against Gilbraltar Savings by making" a misrepresentation "That the business of Brinkcraft, Inc. [BI] and Brinkcraft Development, Inc. [BDI] was ongoing and successful in scope." App. 70a-71a. Instead of focusing on the sufficiency of that fact found by the jury to support the judgment, the court of appeals relied on other statements, introduced in evidence but never found by the jury, in order to sustain liability.[15]

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[15] Neither the court below nor Gibraltar has at any point suggested that the possibility of fraud based on statements other than those submitted to the jury was an issue on which the right to trial by jury was waived under Rule 49(a) Fed. R. Civ. P.

The trial judge explicitly refused the respondent's request to present to the jury a claim of fraud based on the very statement on which the court of appeals ultimately relied. App. 80a. This amounted to the direction of a verdict for the petitioner (and the other defendant) on that issue. Thus, the omitted issue here was a *distinct* basis for a fraud claim, on which the district court had already made a ruling adverse to the respondent. In this situation, the district court could not be deemed under Rule 49(a) to have made a finding on the omitted claim "in accord with the judgment on the special verdict." This separate claim was not encompassed within the jury's verdict as a matter of logical or legal necessity

Had the jury returned a general verdict finding fraud on the basis of all evidence presented, the court would have been justified in examining the entire record for evidence to support that verdict. But where, as here, the jury found fraud liability explicitly resting on a particular representation, the court may not support the judgment by making and relying on fact-findings on issues that were never presented to the jury.

The court of appeals, by looking generally at the evidence at trial, rewrote the jury's interrogatory response in a much broader form than the language itself will bear. Relying on evidence that petitioner had in fact decided to divest itself of BI (and therefore of BI's wholly owned subsidiary, BDI) prior to completion of the loan transaction, the court of appeals concluded:

> The debate thus is over the characterization of Ratcliffe's representations that the Brinkcraft subsidiaries were "ongoing and successful" *and that LD Brinkman Corp. would continue to finance them so long as Gibraltar's loan was outstanding.*

App. 53a (emphasis added). The court relied heavily on the statement emphasized above—the alleged promise to retain and fund the subsidiaries—even though the jury neither returned a general verdict nor responded to an interrogatory dealing with whether any such promise had been made.

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or possibility. Thus, neither the jury's verdict nor the district court's judgment provide any basis for deeming the district court to have made a finding on this claim "in accord with the judgment on the special verdict."

The district court's action in refusing to present the claim to the jury may (or may not) have been correct, but it was a ruling of the court which disposed of the issue at trial. If the district court's action was wrong, it would at most warrant a new trial. There is no basis on which the trial court's decision on this claim could have given the court of appeals authority to go beyond the jury's actual verdict and to make its own *de novo* appraisal on the issue decided by the district court, thus, in effect, directing a verdict the other way.

Petitioner argued in the court of appeals that the "ongoing and successful" statement was non-actionable under Texas law, on grounds of ambiguity and vagueness, or as an opinion or prediction of future prospects.[16] The court rejected this contention on the ground that what really was in issue was Gibraltar's assertion of a promise by petitioner to "continue its financial support of the subsidiaries until the loan was repaid." App., 54a. In reviewing the sufficiency of the evidence to support the fraud claim, the court of appeals did not focus on the statement actually found by the jury—that the subsidiaries were in fact "ongoing and successful"—but rather on the alleged promise to maintain the subsidiaries in the future. It also relied on the "overwhelming" evidence that petitioner intended at the time of the loan to violate that commitment by selling BI (the parent of BDI) to two of its officers. App. 55a-56a. For that reason the court of appeals concluded that the representations "that both BI and BDI were ongoing and would be allowed to operate, grow, and successfully repay their outside liabilities" were "false promises" satisfying the requirement of reckless or knowing falsehood.[17] App. 56a.

These "false promises" were never found by the jury, either as facts, or as a basis for liability on the fraud claim. Nor are such promises logically implicit in the statement that the businesses were "ongoing and sucess-

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[16] C.A. Brief for Appellant, p. 27. The jury was instructed that to support a fraud claim, a representation "must relate to an ascertainable fact as distinguished from a mere matter of opinion, judgment, probability, or expectation." C.A. Record Excerpts for Appellants, p. 313. This proposition is supported by Texas law. *E.g., Zar v. Omni Industries,* 813 F.2d 689, 693 (5th Cir. 1987); *Jeffcoat* v. *Phillips,* 534 S.W.2d 168, 171 (Tex. Civ. App. 1976).

[17] The court immediately thereafter conceded that "a representation regarding the 'ongoing' nature of subsidiaries which a parent corporation is selling to the subsidiaries' officers [as was the case here] would not necessarily be false." App. 56a.

ful," which the jury did find. Only by its own review of the evidence does the court of appeals essentially conclude that the promises should have been in issue before the jury, and thus treat the verdict as embodying them.

Such a reading is especially unreasonable—and an affront not only to the jury process but to the authority of the district court—because the district court specifically considered and rejected a proposed special interrogatory that would have posed to the jury the core of the factual issue decided by the court of appeals—whether petitioner committed fraud in promising not to sell BI until the loan was paid off. App. 80a. Without acknowledging that it was doing so, the court of appeals thus overrode the trial judge's decision not to present the issue to the jury, and directed a verdict of fraud liability based upon that issue.

**C. Damages Award**

As to the award of damages under the fraud claim, the court of appeals usurped the jury's fact-finding function in an even more obvious way. It rejected in principle the theory on which the jury had been instructed, and enunciated a distinct theory, but did not remand for a new trial to allow the facts to be found under the new legal theory. Instead, the court of appeals remanded with instructions that the district court reduce the six million dollar judgment in certain specified respects. It did not utilize the process of remittitur, under which a conditional new trial order is entered. Instead it simply relied on judicial fiat to correct the district court's allegedly erroneous legal theory, and then directed that the district court enter a judgment for damages along lines which it prescribed, and contrary to the actual verdict of the jury.

The district court instructed the jury on two distinct measures of damages—an out-of-pocket loss measure ap-

plicable to respondent's fraud theory,[18] and a benefit-of-the-bargain measure applicable to respondent's theory of tortious interference with contract.[19] Neither party objected to those instructions. On the fraud claim, covered by the out-of-pocket measure, the jury found damages in the amount of $6 million. On the tortious interference with contract claim, covered by the benefit-of-the-bargain measure, the jury found zero damages.

On appeal, petitioner argued that respondent had failed to prove the value of the property received in exchange for the loan, *i.e.*, the guarantees from the individual company officers, and that the jury's finding of $6 million damages on the fraud claim therefore had no evidentiary basis. In response to this argument, the court of appeals rejected in principle the applicability of the out-of-pocket measure of damages. "[T]he straight loan of money without expectation of participating in the profits of the

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[18] As to the damages under the fraud theory, the court instructed:

> You are instructed that as to Gibraltar's claims of fraud, if you find that Gibraltar has suffered injury or damage as a proximate result of the alleged misrepresentations, Gibraltar is entitled to recover damages. The measure of common law fraud damages is the difference between the value of what Gibraltar parted with and the value of what it received on the date the loan was funded. You are instructed that fair market value means the amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts.

[19] As to damages under the tortious interference theory, the court instructed:

> You are further instructed that the measure of damages for wrongful interference with contract is the amount of money you find that Gibraltar would have received under the contract in question had the wrongful interference no [sic] occurred, less any amounts received by GIBRALTAR in connection with this claim from persons or entities other than the defendants.

venture, as here, does not implicate the out-of-pocket limit on damages appropriate in actions under the securities laws." App. 62a.

The conclusion is inescapable that the court of appeals has completely rewritten the theory of damages applicable to the alleged fraud liability, and directed a verdict in accordance with the formula which the court of appeals itself has set out. It has used the jury's $6 million verdict, reached under a measure of damages that it held to be incorrect, simply as a handy starting point from which to begin its own fact-finding deliberations.[20] The court of appeals found it "quite apparent" that the jury had taken into account not only the $5 million note, but also the interest on that money through the time of trial. It then speculated that the jury had "apparently selected a rate" somewhat higher than the rate provided in the note, and concluded that "this error must be reformed by the district court." App. 63a-64a. The court then went on to direct further modifications in the

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[20] If the court's fact-finding as to damages also applies to the judgment pertaining to tortious interference with contract, its action in that respect was even more freewheeling. The court concluded that the jury's verdict of no damages was inconsistent with the jury's finding that tortious interference with contract had, in fact, occurred. If the court's damage analysis is applicable to the tortious interference claim, the court simply cast aside the jury's finding of no damages and substituted its own contrary view that several million dollars in damages are appropriate—on the ground that the jury "evidently" intended to avoid a double recovery. At no time did the court consider whether there might be other explanations for the jury's verdict under the benefit-of-the-bargain measure of damages—such as its valuation in set-off of "any amounts received by Gibraltar in connection with this claim," in accordance with the tortious interference (but not the fraud) damage instruction. *See* notes 18, 19, *supra*. The court neither acknowledged nor followed the principle that it may find facts contrary to those found by the jury only if, as a matter of law, the facts it finds are the only findings that a reasonable jury could reach.

district court judgment to reflect sums actually received in settlements with guarantors and through other ongoing litigation. Under the jury instructions as given, these set-offs were to be considered in calculating damages under the tortious interference theory, but not under the fraud theory.

The court of appeals has no proper power to find facts or to direct a verdict for the plaintiff on the issues of liability and damages. "[A] bald addition of something which in no sense can be said to be included in the verdict is violative of the Seventh Amendment." *United Air Lines v. Wiener*, 335 F.2d 379, 407 (9th Cir. 1964). In affirming the judgment of liability on the fraud theory—based on statements never found by the jury—and in directing entry of a damage award radically different from that returned by the jury—indeed under a wholly different theory of damages—the court of appeals has far exceeded its authority and undermined the basic right of trial by jury.

## III. THE ISSUE PRESENTED OF THE POWER OF COURTS OF APPEALS TO SUPPLEMENT OR OVERRIDE JURY FACT-FINDING MERITS THIS COURT'S ATTENTION

The court below has invaded the province of the jury by directing the entry of judgment for the plaintiff based on its own fact-finding on the issues of liability and damages. It effectively directed a verdict of fraud liability resting on representations that the jury has never been asked to consider, and as to which there was substantial evidence to support the petitioner. It did this without acknowledging that it was doing so, and without any attempt to show that such action was justified under the applicable legal standard. This petition presents no issue of the sufficiency of the evidence to uphold a jury's verdict, or to justify entry or denial of a directed verdict or a judgment notwithstanding the verdict.

Because the role of the appellate courts in reviewing jury verdicts is frequently recurring, and because of the failure of the court below to recognize the extraordinary nature of its action, certiorari should be granted. We submit that the Fifth Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Supreme Court Rule 17.1(a). The error here is a fundamental one, and if left uncorrected, it will likely serve to justify future episodic violations of the right to trial by jury.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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